UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No.533836
Issued to: Raymond H. MATHISON

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2445

Raymond H. MATHISON

This appeal has been taken in accordance with 46 USC 7702 and 46 CFR 5.701.

By order dated 16 January 1986, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's license for two months, remitted on twelve months' probation upon finding proved the charge of misconduct. The specification found proved alleges that Appellant, while serving as operator aboard the M/V BELCHER PENSACOLA, under the authority of the captioned document, on or about 20 July 1984, after an underwater survey and the unauthorized repair of tank barge Belcher No. 35 at Key West, Florida, wrongfully failed to make known to officials designated to enforce inspection laws, at the earliest opportunity, a marine casualty producing serious injury to said tank barge in violation of 46 USC 3315.

The hearing was held at Miami, Florida. on 13 March 1985.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The evidence was incorporated by reference from the case of License No. 18271 issued to Richard Lee HODNETT, which is the subject of a separate appeal. (The charge here and the charge in HODNETT arose from the same incident.) No additional evidence was introduced in this case. In the HODNETT case, the Investigating Officer introduced in evidence six exhibits and the testimony of two witnesses.

In defense, Appellant introduced in evidence two exhibits and the testimony of one witness.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been proved, and entered a written order suspending all licenses and/or documents issued to Appellant for two months, remitted on twelve months' probation.

The complete Decision and Order was served on 18 January 1986. Appeal was timely filed on 14 February 1986 and perfected on 17 April 1986.

FINDINGS OF FACT

On 18 July 1984, Appellant was one of two individuals aboard the M/V BELCHER PENSACOLA to serve as operators. Appellant's Coast Guard license authorizes him to act as operator of uninspected towing vessels of not more than 300 gross tons upon oceans, including the waters of the U.S. not including Western Rivers. The M/V BELCHER PENSACOLA is an uninspected towing vessel of 96 gross tons, 64.7 feet in length, owned by Belcher Towing Company. On 18 July 1984, the BELCHER PENSACOLA was towing the barge BELCHER No. 35, a tank barge 298 feet in length, with a cargo of oil on a voyage to Key West, Florida.

At approximately 1750 on 18 July 1984, the BELCHER No. 35 grounded.Following the grounding, Mr. Hodnett, who was on watch at the time and was at the helm, reported the incident via radio to his employer's dispatcher. Neither Mr. Hodnett nor Appellant reported the incident to the Coast Guard at that time. Subsequently, the BELCHER PENSACOLA freed the barge, and the flotilla continued on to Key West. An inspection of the barge at Key West revealed no contamination of the cargo, although the cargo level for No. 2 port tank was "off" by 1 foot, 4 inches. An underwater inspection on 20 July revealed a hole approximately 5 inches long and 3/8 inches wide in the hull in way of No. 2 port tank. Temporary repairs were made, at a cost of $50.

Appellant and Mr. Hodnett prepared a "Report of Marine Accident, Injury or Death," CG Form 2692, dated 18 July 1986. Appellant signed the form as "Captain." This form was mailed to the Coast Guard Marine Safety Office, Miami, Florida, by an official of Belcher Towing Co., on 23 July 1984, and was received by the Marine Safety Office on 24 July 1984. On 25 July 1984, the Marine Safety Office received telephone notice that a pollution incident involving the BELCHER No. 35 had occurred at the Belchder facility in Miami.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant urges that:

1. The essential element of "willfulness" was omitted from the charge and specification.

2. The charge and specification were not proved.

3. Appellant was prejudiced by the introduction of evidence of the minor oil spill from the BELCHER No.35.

4. The sanction entered was disproportionate to the offense.

5. The Coast Guard "brought charges" against Belcher Oil Company for the same offense.

Appearance: David F. McIntosh, Esq.; Corlett, Killian, Hardeman, McIntosh & Levi, P.A.; 116 West Flager St., Miami, Florida 33130.

OPINION

I

Appellant argues first that since he was charged with violation of a regulation issued under Title 52 of the Revised Statutes (46 CFR 4.05-11(a)), the proceeding was therefore based on 46 USC 239, which refers to a "willful" violation of the statutory and regulatory provisions, and requires that the charge be "violation of statute" or "violation of regulation."

This argument misstates the charge, as well as the current state of the law. It is well settled that a violation of a duty imposed by formal rule or regulation may be charged as misconduct and that there is no requirement that willful misconduct be proved. Appeal Decision 2248 (FREEMAN). Further, 46 USC 239 was repealed by Pub. L. No. 98-89, Aug. 26, 1983, 97 Stat. 500. The pertinent statute is now found at 46 USC 7703, which no longer requires that a violation of law or regulation be willful.

II

Appellant next contends that the charge was not proved by substantial evidence. He advances several grounds for this argument.

Initially, Appellant urges that the Administrative Law Judge erred in taking judicial notice of the charge sheet to find that the Coast Guard had not been notified of the grounding. In considering the notice question, the Administrative Law Judge stated in his Decision and Order in the HODNETT case:

> The service of the charge sheet alleging specifically no notice was given under the regulation or statute implies that nothing was noticed or reported prior to July 24. Said implication is buttressed by LCDR STEINFORD' s testimony that the Coast Guard had no knowledge of the grounding or repairs prior to July 25th. Moreover, this

Administrative Law Judge may take official notice of the absence of any such report prior to 24 July.

Clearly, a charge sheet does not constitute evidence, and any reliance of the Administrative Law Judge upon the charge sheet would constitute error. 46 CFR 5.05-17(a) [current version at 46 CFR 5.23] Further, the absence of a report being filed with the Coast Guard prior to 24 July 1984 is not a fact of which official notice may be taken. See Fed. R. Evid. 201, see also 3 Davis, Administrative Law Treatise, 15:6 (2d ed. 1980). However, any error committed is harmless, since the record clearly supports the Administrative Law Judge's finding that the CG Form 2692 was received on 24 July. (The Coast Guard "date received" stamp indicates 24 July on the Form 2692. The Port Manager for Belcher Towing testified that he mailed the report on 23 July.)

Appellant continues his argument that the charge was not proved by asserting there is no evidence that he was aware of the repairs to the tank barge. This argument is without merit. Authorization for the repairs was signed by Appellant (I.O. Exh. 5). Additionally, the "Report of Marine Accident Injury or Death, " (Resp. Exh. B) which documents information concerning the amount of damage, was signed by Appellant. Ordinarily, these reports are excluded since they constitute admissions during a Coast Guard investigation by the person charged. 46 CFR 5.551. Here, however, the report was introduced by the Respondent in the HODNETT case, and it was expressly stipulated that the record in HODNETT would be incorporated in its entirety into the record here. (Record at 9, Decision and Order at 12.) The report is properly in evidence.

Appellant next asserts that the charge and specification were not proved because there was no "marine casualty" as the term is defined in 46 USC 6101. However, that statute does not define "marine casualty," but rather lists those categories of marine casualties which must be reported. The term is defined in Coast Guard regulations (46 CFR 4.03-1(a)), and includes "any accidental grounding." 46 CFR 4.03-1(b). Here, the record clearly establishes that a grounding occurred.

However, the specification found proved here does not allege that Appellant failed to report a "marine casualty" in violation of 46 USC 6101. Indeed, the grounding was reported to the Coast Guard by the submission of the Form CG-2692.[1] Rather, Appellant was

[1]Coast Guard regulations (46 CFR 4.05-1) require notice "as soon as possible" of a marine casualty. An additional written report is also required (46 CFR 4.05-10(a)), and the regulations specifically provide that this written notice can provide the "as

charged with a violation of 46 USC 3315, which imposes a reporting requirement separate and distinct from those of 46 USC 6101. Under 46 USC 3315, licensed individuals are required to report "at the earliest opportunity, any marine casualty producing serious injury" to a vessel subject to inspection.

Appellant was licensed under 46 USC 7101, and is clearly responsible under the statute to make the report. Without question, a 5 inch by 3/8 inch underwater hole in the cargo tank of a laden single-skin (Resp. Exh. B) tank barge is "serious damage." The Administrative Law Judge determined that the written report, submitted six days after the casualty, did not qualify as "at the earliest opportunity." Decision and Order at 12. I find no reversible error in this determination.

Appellant also contends that the charge was not proven since "there was no substantial evidence concerning the office practices of the Coast Guard Marine Safety Office" and that thus "the evidence failed to prove that he did not timely (i.e. within five days), file a casualty report." Appellant's Brief at 20. However, Appellant has not been charged with failure to file a casualty report within five days, but with failure to report a "serious injury" to a vessel subject to inspection "at the earliest opportunity." As noted supra, I find no reason to disturb the Administrative Law Judge's determination that he did not do so.

III

Appellant next contends he was prejudiced by the introduction into evidence of the fact of an oil spill from the BELCHER No. 35 which occurred subsequent to the time when he surrendered care, custody and control of the barge. He argues that the Investigating Officer misrepresented to the Administrative Law Judge that evidence of the spill was necessary to establish the fact that this was the first notice the Coast Guard had of the damage to the barge. This argument is without merit. The Administrative Law Judge did not rely upon evidence of a spill in making his determination as to the timeliness of the casualty report. Moreover, the fact of a spill was admissible in the determination of an appropriate sanction. See Appeal Decision 2402 (POPE).

IV

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soon as possible" notice if submitted "without delay." (46 CFR 4.05-10(b) The term "without delay" is not defined, and no conclusion is reached here whether these regulatory requirements were or were not met in this case.

Appellant next contends that the sanction is disproportionate. It is well settled, however, that the sanction imposed at the conclusion of a case is exclusively within the authority and discretion of the Administrative Law Judge unless there is a showing that an order is obviously excessive or an abuse of discretion. Appeal Decisions 2422 (GIBBONS), 2391 (STUMES), 2362 (ARNOLD) and 2313 (STAPLES); see also Appeal Decision 2173 (PIERCE). There was no such showing here.

V

Finally, Appellant contends that the Coast Guard took "inconsistent positions" since a civil penalty was assessed against Belcher Towing for this same incident. However, civil penalty proceedings are separate and distinct from suspension and revocation proceedings, which are remedial, and not penal in nature. 46 CFR 5.01-20 [current version at 46 CFR 5.5]. There is no inconsistency in the initiation of both proceedings.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Laws Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision of the Administrative Law Judge dated at Jacksonville, Florida, on 16 January 1986, is AFFIRMED.

J. C. IRWIN
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 6th day of March, 1987.